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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____.

MORRIS R. BLANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

OPINION BY THE COURT BELOW.

The United States Court of Appeals for the Sixth Circuit delivered an opinion in this matter, which opinion has not yet been published. This opinion is set forth in the appendix hereto at pages 32-44 of this Petition.

JURISDICTION OF THIS COURT.

The Petitioner herein requests review of a judgment of the United States Court of Appeals for the Sixth Circuit which judgment was entered of record therein on April 8, 1967. This judgment affirmed a verdict of guilty and a judgment had and entered in the United States District Court for the Northern District of Ohio, Eastern Division, on April 30, 1965.

Jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit is conferred in Title 28, Section 1254(1).

QUESTIONS PRESENTED.

I. Did not the Court of Appeals for the Sixth Circuit, in its refusal to follow the doctrine set forth by this Court in *Michelson v. United States* and its cavalier rejection of the holding in *Sloan v. United States,* improperly justify the trial court's prejudicial error respecting the cross-examination of character witnesses on the basis of newspaper insinuation, thereby abusing fundamental concepts to the great harm of Petitioner?

II. Did not the Court of Appeals for the Sixth Circuit, in its factually unsupported attempt to defend and justify the trial court's wholly inadequate jury instructions, abridge Petitioner's absolute right to a jury instruction respecting Petitioner's theory of defense?

III. Did not the Court of Appeals for the Sixth Circuit underestimate the virulent effect and substantive unfairness of the trial court's admonition to the jury wherein it was stated that the trial judge had striven with every possible means at his disposal to prevent jury corruption by persons who would influ nce their verdict, that it was the duty of the jurors to report attempts to contaminate their minds, and inferentially that such attempts would be or had been made?

IV. Did not the Court of Appeals for the Sixth Circuit improperly justify a conviction under a statute which was completely alien and inapplicable to the facts of this matter and under an indictment which did not state a criminal offense?

STATUTES INVOLVED.

UNITED STATES CODE ANNOTATED.

Title 18, Section 152. Concealment of assets—False oaths and claims—Bribery.

"Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

"Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

"Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

"Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

"Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

"Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

"Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

"Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, Section 371. Conspiracy to commit offense or to defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000. or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18, Section 1341. Frauds and swindles.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 11, Section 96, (d).

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

"If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of the reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment on the transfer has been made, returned to the bankrupt."

STATEMENT OF THE CASE.

Petitioner, Morris R. Blane, a Cleveland, Ohio, lawyer specializing for some thirty-three (33) years in bankruptcy and debtor-creditor relations, suddenly found himself pitted in a United States Court against a former client whose prison sentence was vacated upon his agreement to serve as a witness against Petitioner. The former client, Harold I. Slote, had operated a jewelry business (Sterling Jewelry & Appliance Company, Inc.). Slote, as a business man and as an individual, had a marked history of instability. By reason of Slote's medical history, particularly throughout the period of his dealings with Petitioner, it fell upon the District Court to conduct a voir dire to determine Slote's mental competency to testify as a witness (21-39a). Concerning the mental aberrations of Slote, the following testimony of a psychiatrist on voir dire is most descriptive (39a).

> "His internal emotional problems have been many. He has marked mood swings from depression and withdrawal on the one hand to becoming excited, elated, and overactive, on the other. There has been much tension and agitation with considerable pressure of speech. At times he has behaved very impulsively, and other times he bogs down in long periods of preoccupation and rumination over past failures and errors. He has gone through long periods of extreme indecision and vacillation, and it is during these times that his dependency upon others has been most prominent. Despite seeking advice from many sources he attempts to give the impression of great independence and self sufficiency. *In order to do this he frequently distorts the facts and attempts to cover up his feelings of doubt, weakness, and inadequacies.* Because of these feelings within he has tried to build himself up from the outside, leaning heavily upon his business, his wife, his role as a 'big shot'. He gets into many emotional difficulties quite easily and then

extricates himself with much difficulty and psychological pain." (Emphasis supplied.)

Count I of the indictment charged a violation of Title 18, Section 152 in that Petitioner, having received property prior to bankruptcy, allegedly concealed same from the bankruptcy trustee. Count II charged a violation of the same statute in that Petitioner allegedly transferred property of the bankrupt and had concealed same with intent to defeat the bankruptcy law. The Petitioner was acquitted of the offense charged in Count III, and same need not be discussed. In Count IV, Petitioner was charged with having conspired to transfer property with intent to defeat the bankruptcy law. Count V charges a conspiracy to commit mail fraud. The indictment is reproduced on pages 4-12a.

In January, 1961, Sterling was unable to pay its debts and contacted its attorney, one David Gold, who in turn called in Petitioner as a specialist. It was contended that for the period from January, 1961, to August, 1961, Petitioner counselled and advised the company and Slote to build up its inventory by indiscriminate purchases with a view to ultimately defeating creditors in some type of insolvency proceeding, and that Slote and Petitioner conspired to store at least a part of the merchandise so acquired in warehouses with the intent that such merchandise would ultimately be concealed from a prospective trustee in bankruptcy. There was evidence that during this period the accounts payable rose from Sixty-Two Thousand Dollars ($62,000.00) to approximately One Hundred Fifty-Four Thousand Dollars ($154,000.00). There was evidence that from time to time *prior to the institution of insolvency proceedings*, Petitioner accepted a set of pearls with a clasp, a diamond engagement ring and a pair of binoculars.

In August, 1961, a plan for arrangement of debts was filed under Chapter XI of the Bankruptcy Act. This plan was aborted by reason of the failure of the bankrupt to pay the required sum on confirmation by creditors. The company thereafter consented to a voluntary adjudication of bankruptcy. As an aftermath of the numerous hearings before the bankruptcy referee, Slote ultimately pleaded guilty to charges of transferring and concealing assets from the trustee by reason of his failure to list certain assets and the location thereof on his bankruptcy schedules. Slote was sentenced to prison. Within twelve (12) hours after he was confined, Slote summoned the F. B. I. and for the very first time represented that all of his derelictions were really the handiwork of his attorney, Petitioner herein.

Petitioner, at his trial, maintained that his intervention was for the avowed purpose of negotiating with creditors in an effort to obtain extensions for payment of their claims in order to keep the client in business until the Christmas season of 1961, when, hopefully, the accounts could be at least partially liquidated by reason of the increased Christmas volume.

The record indicates that Petitioner counselled Slote to buy moderately and that he had no immediate knowledge of the extent of Slote's numerous buying sprees in Chicago and New York. Slote himself candidly admitted that Petitioner did not know the location of any warehouses or storage places for furniture.

Petitioner further maintained that the subsequent plan for arrangement of debts was necessary because he was unable to stave off creditors any longer. Prior to this determination, however, and for a period commencing April, 1961, through August, 1961, long in advance of any anticipated bankruptcy, Petitioner represented Sterling

in at least twenty (20) lawsuits for merchandise purchased. Throughout a period of some eight (8) months, Petitioner received not one cent for his services and Slote himself suggested that Petitioner might be willing to accept some personal gift items from the store, to which Petitioner agreed. The pearls and clasp were delivered and given by Petitioner as a present to his wife on their twenty-fifth (25th) wedding anniversary. The ring was credited to Slote's account although it was ordered by one of Petitioner's office associates. Petitioner had no interest in this transaction. The binoculars and the case were tendered by Slote to Petitioner in the presence of the Court-appointed Receiver when the business was ultimately closed. It is interesting to note that on all items of merchandise (and there were some not contained in the Indictment) Petitioner signed a written memorandum for all to discern upon receipt of same. Petitioner claimed that any merchandise which he might have received was for legal fees rendered long in advance of any contemplation of bankruptcy and that from and after the filing of the plan for arrangement of debts, even up to the time of trial of the case at hand, Petitioner had received no compensation for his services whether related to bankruptcy or unrelated to bankruptcy, except as above stated.

The Petitioner further offered a number of witnesses as to his good character in the community and reputation at the Bar.

Petitioner was acquitted of the charge set forth in Count III, but was found guilty with respect to the other four counts. He was sentenced to forty months and fined $5,000.00 on Count I with the identical sentence being imposed upon Count II to run concurrently with Count I. Petitioner was likewise sentenced to forty months on Count IV to run consecutively with the sentence imposed

upon Counts I and II, and concurrently with a forty month sentence imposed upon Count V, a total of eighty months in prison and a fine of Ten Thousand Dollars ($10,000.00) (3a).

REASONS FOR GRANTING THE WRIT.

A Writ of Certiorari should be granted in this matter for the following reasons:

(a) The Court of Appeals herein utterly ignored the holding and basic rationale of *Michelson v. United States*, 335 U. S. 469 (1948).

(b) The Court of Appeals herein expressly declared its disagreement with and non-adherence to the decision of the Court of Appeals for the Eighth Circuit in *Sloan v. United States*, 31 F. 2d 902 (CA 8, 1929), which decision conforms to the principles proclaimed by this Court in *Michelson v. United States*.

(c) Petitioner, an attorney at law, was convicted solely upon the testimony of a full-blown schizophrenic former client who was a mental patient during trial and who testified *after* his prison sentence was vacated.

(d) The lower courts, in sanctioning Government cross-examination of character witnesses on a basis of newspaper material, inflicted such prejudice upon Petitioner and so far departed from accepted and usual procedures as to call for an exercise of this Court's power of supervision.

(e) The lower courts, in depriving Petitioner of his right to a jury instruction relating to his theory of the defense, in inferring that the defense had or would corruptly contact members of the jury, and in permitting a conviction under an indictment that did

not state an offense, sanctioned such departures from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

QUESTION NO. I.

Did Not the Court of Appeals for the Sixth Circuit, in Its Refusal to Follow the Doctrine Set Forth by This Court in Michelson v. United States and Its Cavalier Rejection of the Holding in Sloan v. United States, Improperly Justify the Trial Court's Prejudicial Error Respecting the Cross-Examination of Character Witnesses on the Basis of Newspaper Insinuation, Thereby Abusing Fundamental Concepts to the Great Harm of Petitioner?

In the course of his defense, the Petitioner offered the testimony of various character witnesses, including that of two Common Pleas Judges and a Congressman, all of whom testified that the Petitioner's general reputation for truthfulness was good. With respect to two of the character witnesses, Preisler and Murphy, the Government was permitted to inquire as to whether they had read newspaper articles concerning the Petitioner, and whether such newspaper articles had been considered by the witnesses in assessing the Petitioner's general reputation.

Counsel objected at the time of such interrogation and thereupon moved for a mistrial and that all questions and answers relating to newspaper articles be stricken with appropriate instructions to the jury (407, 408, 413, 414, 418a).

Petitioner's objections and motions were overruled.

The Government initiated its inquiry regarding newspaper articles by asking the witness Preisler whether he

had read newspaper accounts relative to Petitioner. Defense counsel's objection was overruled (407a). The witness then testified that he had read some newspaper articles regarding Petitioner, but that he had not believed them (407a). When pressed, the witness responded that the articles had stated that Petitioner had done something dishonest which he could not recall (408a). At this point the Court sustained Petitioner's objection. A *voir dire* was thereupon ordered and held by the Court out of the presence of the jury. The Court expressly allowed and directed the Government to "Examine him with respect to whatever newspaper you have" (408a). The Government, upon *voir dire,* proceeded to inquire into a specific newspaper article which the witness did not recall having seen or read (409, 410a).

Upon completion of the *voir dire,* the following exchange ensued between the Court and the United States Attorney (410a):

> "Mr. McCurdy: I have no further questions on that point.
>
> The Court: You mean in your *preliminary examination*?
>
> Mr. McCurdy: On this preliminary, yes.
>
> The Court: Well, of course, it seems to me this would exclude any further reference to the article you had in mind to inquire of him; however, *are you meaning to suggest that you don't want to proceed and get the same answers he gave you here to the jury*?
>
> Mr. McCurdy: I mean that I have nothing further to put to him now on this preliminary matter.
>
> The Court: All right. Call the jury." (Emphasis supplied.)

The jury was called back and Government cross-examination proceeded as follows:

"By Mr. McCurdy:

Q. Mr. Preisler, you told us that you read a newspaper account in which that related that Mr. Blane had done something dishonest. Is that what you said?

A. No, you said that.

Q. What did you say about the newspaper article that (976) you read?

A. I said I read something in the article about Mr. Blane that was an untruth, I felt, that is an untruth.

Q. Didn't you say he had done something dishonest?

A. No, I didn't say he had done something dishonest.

Q. All right. What was it you read in the newspaper that said that Mr. Blane—

A. I don't remember.

Q. Wait until I finish. Let me ask you, you say you have been his social friend, and he has been your lawyer for some 30 odd years?

A. Yes.

Q. You like him, don't you?

A. Yes.

Q. You are friends right now?

A. Um-hm.

Q. Would you like to help him if you could?

A. Sure.

* * *

Q. Now, tell the jury what it was that you read that you don't believe?

A. I don't remember exactly what it was. It was an article.

Q. If you don't remember, tell us to the best of your recollection.

A. Well, it seems to me that it had something to do with misappropriation of funds in the bankruptcy, and that is about the best that I can remember, to the best of my ability.

Q. Do you recall it charging Mr. Blane with doing anything else other than misappropriating funds.

A. No.

Q. You say that you did not believe that?

A. That is right.

Q. Did you talk to Mr. Blane about it?

A. No.

Q. Did you ask Mr. Blane whether or not he had misappropriated funds?

A. No.

(978) Q. Did you talk to anybody else about it?

A. I don't think so.

Q. Did you consult anybody about whether or not Mr. Blane had misappropriated funds?

A. No.

Q. Then will you say to the Court and jury upon what you found your disbelief of the newspaper article?

A. Only because I think he is honest and he wouldn't misappropriate funds.

Q. That is your opinion, personal opinion?

A. That's right.

Mr. McCurdy: That is all."

It is difficult to conceive of any line of interrogation that could have been more damaging or prejudicial—even if, *as is not the case here,* the matter inquired into had been true. It is believed important to note that there never had been any such newspaper article regarding misappropriation or dishonesty.

Not satisfied at this point in having thus contravened the protective concept enunciated in *Sloan v. United States,* 31 F. 2d 902 (CA 8, 1929) and cited with approval in *Michelson v. United States,* 335 U. S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948), the Government under protective ruling of the Court, continued the same line of cross-

examination with one Murphy, another of Petitioner's character witnesses:

"By Mr. McCurdy:

(1008) Q. Now, being a friend of Mr. Blane's, and being an attache of the Court, are you, would this cause you to be interested in any rumors that you would hear about Mr. Blane or newspaper articles appearing about him?

Mr. Jewitt: We object, your Honor, (1009) and ask that the words 'newspaper articles' be stricken.

The Court: Well, would it cause you—if you are asking whether it did cause or whether he did hear rumors?

Q. All right.

A. You hear lots of rumors. I don't believe rumors.

Q. Well, did you hear some rumors about Mr. Blane that you didn't believe?

A. You read articles in the paper. I don't believe articles I read in the paper.

Q. Did you read some articles in the paper about Mr. Blane that you didn't believe?

Mr. Carroll: We object.

The Court: He said that.

A. Yeah, the articles I read in the paper, I don't believe.

Q. All right. More than one article?

A. Yeah. Plain Dealer and Press carry them. I read them.

Q. You read them. Can you tell us what you read in either one of the papers about Mr. Blane that you don't believe?

Mr. Jewitt: We object.

Mr. Carroll: May we approach the (1010) bench on this matter?

The Court: Yes."

Petitioner's motion for mistrial at this time was overruled, as was his motion to strike all questions and answers (418a).

The trial judge thereupon stated his understanding of the law concerning the cross-examination of character witnesses as follows:

> "I think it proper for the Government to ascertain of any character witness whether or not he had heard rumors. *I believe that this properly encompasses the reading of a newspaper.*" (Emphasis supplied.)

The Supreme Court of the United States in *Michelson v. U. S.*, 335 U. S. 469 (1948), definitively announced the basis for the rule allowing cross-examination of character witnesses with respect to rumor. Newspaper material manifestly does not fulfill the requirements for admissibility. Of great significance to the instant inquiry is the fact that the Supreme Court in the *Michelson* case specifically alluded, in footnote No. 17 on pages 480, 481 of the official report, to *Sloan v. United States,* 31 F. 2d 902 (CA 8, 1929) and to the question which arises by reason of cross-examination of character witnesses regarding newspaper articles.

Sloan is predicated upon and proclaims a venerable doctrine which has long governed the cross-examination of character witnesses. *Michelson* definitively announced this doctrine and the rationale therefor. The Court of Appeals for the Sixth Circuit demonstrated its disdain for the reasoning and holdings of *Michelson* and *Sloan* in the following cavalier utterance appearing in its opinion (Appendix, this Petition, p. 36):

> "Newspaper accounts may be as much a part of a community's thinking regarding the reputation of an individual as rumors and suspicions that circulate orally among his neighbors and associates. To the

extent that Sloan v. United States, 31 F. 2d 902, 905, 906 (CA 8, 1929) appears to hold differently, we advise our disagreement with its conclusion."

In *Michelson*, the Government, on cross-examination of character witnesses, asked if such witnesses had heard that the defendant had been arrested for receiving stolen property. None of the witnesses had heard any such thing.

At this point the trial judge asked the prosecutor if he had evidence of such arrest. The prosecutor displayed to the judge documentary evidence thereof. *This factor is of crucial importance, and was not as a matter of fact, proffered by the Government in the instant case.*

The controlling significance of establishing in the *very first instance* a basis in fact for the question concerning rumor has been recognized by all courts which have passed upon the matter (except, it would seem, the Court of Appeals for the Sixth Circuit). This crucial aspect of the matter was completely ignored by both the District Court and the Court of Appeals.

Cf. *Pittman v. United States,* 42 F. 2d 793 (CA 8, 1930), *United States v. Phillips,* 217 F. 2d 435 (CA 7, 1955), *Krogmann v. United States,* 225 F. 2d 220 (CA 6, 1955), *Gosser v. United States,* 339 F. 2d 102, 112 (CA 6, 1964), *Malatkofski v. United States,* 179 F. 2d 905 (CA 1, 1950).

In all of the foregoing cases, the requirement that a Government proffer as to the truth of the material inquired into was held essential to the propriety of such inquiry. Failure of the trial court to require such foundation is a patent abuse of discretion. *Malatkofski v. United States,* 179 F. 2d 905 (CA 1, 1950).

It is submitted that even if we were dealing with *rumors* such foundationless inquiry would represent reversible error. Compounding the error, however, is the

fact that the questions related specifically to alleged newspaper articles and not to rumors...

Sloan v. United States, 31 F. 2d 902 (CA 8, 1929), cited with approval in the *Michelson* case, appears to set forth the foremost prouncement relating to the impropriety of the cross-examination of character witnesses predicated upon newspaper articles and the reasons for such impropriety.

In *Sloan* the Court of Appeals for the Eighth District, after reviewing the propriety of the cross-examination of character witnesses on a basis of rumor, specifically held that newspaper material did not fall within the category of rumors.

This Court of Appeals for the Eighth Circuit thus held that cross-examination based upon newspaper articles was reversible error. *Pittman v. United States*, 42 F. 2d 793 (CA 8, 1930).

While, in the first instance, there is an ever-present possibility of prosecution abuse of such cross-examination, the possibility for abuse by the uninformed, the prejudiced, the vindictive newspaper writer, is immeasurably greater.

It is therefore believed that the error of both the District Court and the Court of Appeals with respect to this prejudicial cross-examination grievously derogated from Petitioner's right to a fair trial.

QUESTION NO. II.

Did Not the Court of Appeals for the Sixth Circuit, in Its Factually Unsupported Attempt to Defend and Justify the Trial Court's Wholly Inadequate Jury Instructions, Abridge Petitioner's Absolute Right to a Jury Instruction Respecting Petitioner's Theory of Defense?

Petitioner announced in his opening statement his theory of defense. His evidence and the thrust of his cross-examination of government witnesses bore directly upon this theory. Petitioner's closing argument revolved around this theory.

The trial judge nonetheless refused to instruct the jury with respect to this theory of the defense. The Court of Appeals somehow found that the requested charge had been included in the trial court's general charge. Close examination of the requested charge (459-462a) and that portion of the trial court's charge which is said to encompass the matter requested discloses that the court's charge is completely devoid of the Petitioner's theory of defense.

The Court of Appeals thus suggests that in the Sixth Circuit there exists no distinction in legal effect between the transfer of money or property as attorney fees for legal services performed *in contemplation of bankruptcy* and for legal services rendered under circumstances wherein *bankruptcy is not contemplated* and where, as a matter of fact, attorney and client are striving to avoid bankruptcy.

In opening statement Petitioner stated his evidence would establish the fact that the client indicated he had no money to pay for legal services and that perhaps some jewelry merchandise would be acceptable in lieu thereof. (See Supplemental Appendix, pp. 45-46, Brief of Appellant in the Court below.) The record of this matter is

replete with testimony establishing Petitioner's very substantial legal services which were rendered incident to the defense of lawsuits and other matters having absolutely no relationship to bankruptcy, same having been rendered long prior to any contemplation thereof. Petitioner freely admitted that he had accepted the merchandise set forth in the indictment and even other items not specified in the indictment—all as partial payment for these services.

It is readily apparent that the distinction between the legitimate acquisition of the merchandise set forth in Counts I and II, as contended by the Petitioner, and corrupt acquisition, possession and transfer, as contended by the Government, represents the difference between a verdict of guilty and not guilty.

It is reversible error to refuse to present adequately in a criminal case a defendant's theory of the defense. *Bird v. United States,* 180 U. S. 356, 361, 45 L. ed. 570, 573 (1901), *Hendrey v. United States,* 233 Fed. 5, 18 (CA 6, 1916), *Marson v. United States,* 203 F. 2d 904, 912 (CA 6, 1953), *Tatum v. United States,* 190 F. 2d 612, 617 (CA DC, 1951), *Hersh v. United States,* 68 F. 2d 799 (CA 9, 1934).

The acceptance by Petitioner of certain items of merchandise from Sterling Jewelry through its president as legal fees for services performed on behalf of Sterling *prior to bankruptcy* and *prior to any contemplation of bankruptcy,* and with respect to services *not germane to bankruptcy* was one of the salient aspects of the defense and was imperative to the defense. Resort to the Bankruptcy Court and to the relief available therein was neither contemplated nor discussed until a period much later and far removed from the receipt of the items of jewelry.

Petitioner never received any money-consideration from Sterling for his many legal services.

When Petitioner requested a specific charge (Request No. 3, 459-462a), placing the concept of his defense before the jury, the trial judge stated (464a):

> "I think they are in the charge. I think they are fully comprehended in the charge."

The trial judge was in error, as a comparison of the charge with the request will reflect.

The Court of Appeals reproduced in its opinion various portions of the charge (Appendix, this petition, pages 38-40) and without any comment, stated that this portion of the charge covered the legitimate content of Petitioner's request.

It may be reasonably inferred from the above that the Court of Appeals for the Sixth Circuit refuses to burden itself with a legal analysis of the subtleties of the Bankruptcy Act as it relates to the question of fees of counsel or the transfer of property in payment of fees. Though Petitioner specifically requested, there is no reference whatsoever to Section 60(d) of the Bankruptcy Act (Title 11, Section 96(d)), which is the focal point relating to counsel fees. In *Williams v. United States,* 328 F. 2d 256, the Court states:

> "The court may and generally should, when governing law is expressed in a statute, employ the language of the statute in its instructions."

In Petitioner's Request for Instruction Number 3, the Court was asked to read Section 60(d), which the Court declined to do. In digesting the charge as given by the Court on this important subject, one finds that the Court said no more than:

> (a) Petitioner had a right to receive the property of a person *contemplating* bankruptcy, but that
>
> (b) He could only receive such property or aid the bankrupt in selling, transferring or otherwise

disposing of the property prior to the filing of the petition so long as he did not do so knowingly and fraudulently or cause at least one of the items to be transferred for the purpose and with the intent to conceal such property.

This instruction does not even approach Petitioner's theory of defense. This instruction completely ignores the matter of attorney fees incident to services rendered *not in contemplation of bankruptcy,* and thus deprives Petitioner of that balance of instruction, the lack of which the courts have held to be reversible error.

The refusal of the Court to isolate or divorce the question of attorney fees from the subject of bankruptcy itself created a very specific type of prejudice in this case which quite obviously prevented a fair trial. The Court did not explain to the jury in any manner the obligation of an attorney to disclose on Schedule B-4 of the petition (Government's Exhibit No. 2) the sum of money paid to him for services rendered and to be rendered *in contemplation of bankruptcy,* as opposed to the non-requirement therefor regarding services rendered at a time when *bankruptcy was not contemplated.* As evidence of Petitioner's claimed guilt, the Government revealed to the jury that in answer to the question of Schedule B-4 relating to counsel fees, Petitioner had indicated "None." The jury was left in an absolute vacuum on this vital issue and may well have arrived at the conclusion that the Petitioner deliberately falsified his answer, although his answer "None" had been completely responsive and proper.

As stated in paragraph 3 of the syllabus of *Kotteakos v. United States,* 328 U. S. 750, 765 (1946):

> "The question is not whether the jury's verdict was right regardless of the error, but what effect the error had or reasonably may have had on the jury's decision."

QUESTION NO. III.

Did Not the Court of Appeals for the Sixth Circuit Underestimate the Virulent Effect and Substantive Unfairness of the Trial Court's Admonition to the Jury Wherein It Was Stated That the Trial Judge Had Striven With Every Possible Means at His Disposal to Prevent Jury Corruption by Persons Who Would Influence Their Verdict, That It Was the Duty of the Jurors to Report Attempts to Contaminate Their Minds, and Inferentially That Such Attempts Would Be or Had Been Made?

At the close of the last day in which testimony was heard in this case, and prior to adjournment, the United States Attorney requested a conference at the bench, and thereupon stated that the Government had learned that some member or members of the jury had been contacted and offered a sum of money—ostensibly for a defense verdict. The United States Attorney requested that the jury be instructed to advise the court if any member or members had been or should be contacted. Defense counsel objected to anything beyond the usual admonition. The Court nonetheless stated the following:

> "Now, ladies and gentlemen, we have reached that point in this case where, from your own experiences, or observations, you may well have concluded that you have heard this case. I wish to emphasize at this time that this case is not concluded. The attorneys in this case are going to be permitted to summarize and give you their interpretations of the evidence. They are going to be permitted to argue the case to you, and one of the critical parts of every trial is at this time, as best I can judge it, not going to be given to you until some time Monday, and what I am referring to is the instructions as to the law of this case.
>
> "The instructions which the Court will give as to the law will follow the arguments of counsel. It is not

until you know the law of the case that you can arrive at a just verdict.

"Now, I have admonished you at different occasions by calling your attention to the fact that you are not to discuss this case among yourselves until it is finally submitted, and it is not yet finally submitted. I have admonished you that you should not form or express any opinion as to the guilt or innocence of the accused until the case is finally submitted and it has not been finally submitted.

"I have put double emphasis on the fact that you should not permit anyone to speak to you on the subject of this case. Now, you will recall the great care and the extent of inquiry that was made during the voir dire to determine your qualifications as jurors, to determine whether you were persons who had an open mind on the subject of this case, and that you would impartially consider this case and not be influenced by anything except what you heard from the witness stand by way of testimony, and the exhibits and other evidence which the Court has admitted.

"Now, if you should permit anyone to speak to you on the subject of the case, no matter how slight, it is impossible for you to divorce this from your mind. So avoid it. If someone speaks to you and they attempt to speak to you on a subject of this case, you tell them you are on this jury, and when I told you that if anyone persisted in talking to you you should communicate to me, this was no idle suggestion.

"Now, I realize that each of you have husbands and wives and members of your family, and when you go home your wife or husband, as the case may be, is going to say 'How did the case go?' I am not talking about that. Your children may ask you some idle thing about it and you many answer them, *but what I am concerned with is that someone who has a deliberate purpose of influencing your mind will do or say something which would so contaminate your*

mind that you could not follow your oath, and you could not perform the duties you have sworn to perform, *and this, of course, is what I am striving with every possible means at my disposal to prevent.*

"Now, if any of you have had an experience, an occasion where somebody has sought to talk to you about this case or communicate with you, I don't care what manner, telephone, written, or otherwise, I want you to let this Court know. There may be an occasional reluctance on your part to take part in any inquiry that may follow, but the right, the privilege, of sitting on a jury in this great country is one of the highest privileges which an American citizen has to serve his country and community, and I want you to keep these instructions in mind and come back here Monday morning at 10:00 o'clock in such a state of mind without any contamination as you were in when you began the trial of this case." (Emphasis supplied.)

Somehow the Court of Appeals concluded that the first two paragraphs vitiated the prejudicial effect of the whole.

It is submitted as unlikely that any of the jurors would have considered any such corrupt contacts as were mentioned by the Court to emanate or to have emanated from the Government. It is submitted as certain that the jurors ascribed and would ascribe any such activities to the defense.

The trial judge implied to the jury that he was locked in a great struggle with some corrupt force in attempting to prevent contamination of the jury and that some of the jurors, notwithstanding his Herculean efforts, may already have been contacted by these corrupting agents.

It is difficult to conceive how the trial judge, even though his words were inadvertent, could have more effectively suggested an essential corruptness of the de-

fendant or could have more succinctly voiced the accusation that these improper activities had been or would be engaged in by the defendant-petitioner.

There is an abundance of authority which deprecates and holds erroneous words or actions of the trial judge which prejudice the accused with the jury.

> "It is obvious that under any system of jury trials the influence of the trial judge is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling." *Starr v. United States,* 153 U. S. 614, 626 (1894).

In 1945 this Court again announced that:

> "* * * jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenback v. United States,* 326 U. S. 607, 612 (1945).

Cf. 23 *Corpus Juris Secundum,* pp. 995-998, 1002, *Chalupiak v. United States,* 223 F. 2d 523 (CA 6, 1955), *Trussel v. United States,* 278 F. 2d 478 (CA 6, 1960), *United States v. Link,* 202 F. 2d 592 (CA 3, 1953).

While the Court of Appeals did not, in this matter, look with approval upon the trial court's words or practice, it evidently believed the error to be "harmless error" which did not affect the substantial rights of petitioner. It is not believed that this analysis is realistic. It is definitely not consonant with the previous holdings of the Court of Appeals for the Sixth Circuit.

It is submitted that the above-quoted admonition conclusively impaired the right of petitioner to a fair and impartial jury and that it materially affected the outcome of the case.

QUESTION NO. IV.

Did Not The Court of Appeals for the Sixth Circuit Improperly Justify a Conviction Under a Statute Which Was Completely Alien and Inapplicable to the Facts of This Matter and Under an Indictment Which Did Not State a Criminal Offense?

Count II of the indictment in the instant matter was brought under the provisions of paragraph six (6) of Section 152, Title 18, United States Code.

Count II of the indictment, on its face, does not state an offense, nor does Count IV of the indictment herein.

Count II of the indictment alleges, *inter alia,* that Morris R. Blane, *Attorney* for the *Sterling Jewelry and Appliance Company, Inc., the bankrupt,* and *in contemplation of a bankruptcy proceeding* by and against the said *Sterling Jewelry and Appliance Company, Inc.,* and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said *The Sterling Jewelry and Appliance Company, Inc.* (describing the property and the alleged value thereof); in violation of Section 152, Title 18, United States Code (5a-7a).

The language of Count II of the indictment follows the language of the 6th paragraph of Section 152 as amended. In no other paragraph of said statute is such language used.

The 6th paragraph of Section 152 provides in pertinent part:

> "Whoever, * * * as an agent * * * of *any corporation,* in contemplation of a bankruptcy proceeding by or against * * * *any other* * * * corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of * * * the property of *such other* corporation; or" (Emphasis supplied.)

In the 1960 amendment, as set forth immediately above, the words "any other" and "such other" are inserted into the 6th paragraph, thereby completely changing the meaning and coverage of the statute.

Thus, in order to come within the ambit of the 6th paragraph of Section 152, Morris R. Blane would have to have corruptly transferred or concealed the property of a corporation *other than* Sterling Jewelry.

Prior to the 1960 Amendment, the 6th paragraph of Section 152 read, in pertinent part, as follows:

> "Whoever, while an agent * * * of any * * * corporation, and in contemplation of a bankruptcy proceeding by or against *such* * * * *corporation*, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of *such* * * * *corporation*; or" (Emphasis supplied.)

It is apparent that the indictment in the instant matters would state a criminal offense *Under the Pre-amendment Provisions of Section 152.*

The purported purpose of the 1960 amendment was described in *U. S. Code Congressional and Administrative News, 86th Congress, Second Session,* Volume 2, pp. 3307-3310.

Thus, it is set forth on pages 3307-3308 that:

> "The purpose of the proposed legislation is to provide that individuals who knowingly and fraudulently transfer or conceal their property in contemplation of their own bankruptcy shall be held to the same degree of accountability as the law now provides for agents and officers of potential bankrupts."

In a letter to Senator James O. Eastland from the Administrative Office of the United States Court dated June 26, 1958, it was recommended that the following be enacted by the Congress as paragraph 6 of Title 18, Section 152:

> "Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against *any* person or *corporation,* or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of *such* person or *corporation;* or" (Emphasis supplied.)

It is to be noted that the word "other" is not used in the wording proposed by the Administrative Office of the United States Courts, and that the instant indictment would state a criminal offense if the wording thereof had been adopted by the Congress. It was *not* adopted and used by the Congress, however, and we are confronted with the amended statute as it now stands.

Certainly the words "other" and "such other" cannot be deleted from the statute, nor can the plain meaning thereof be *negated* by any authority other than the Congress of the United States.

It is stated in the opinion of the Court of Appeals in this matter at page 12 thereof that "The appellant's claim that Count II of the indictment did not state a criminal offense is, in our view, patently without merit, and we need not discuss it." This analysis ties in rather closely with the Court's attitude as evidenced upon argument of this subject in the Court of Appeals when Judge O'Sullivan (who wrote the opinion) expressed the thought that regardless of the verbal and consequent legal insufficiencies of a statute there could be no complaint concerning its literal inapplicability if we knew what the Congress *meant* to say.

It was said in *United States v. Universal C. I. T. Credit Corporation,* 344 U. S. 218 (1952) that:

> "* * * when choice has to be made between two readings of what Congress has made a crime, it is ap-

propriate, before we choose the harder alternative, to require that Congress should have spoken in language that is clear and definite. *We should not derive criminal outlawry from some ambiguous implication.*" (Emphasis supplied.)

This concept was mentioned with approval by this Court in the later case of *Ladner v. United States*, 358 U. S. 169 (1958).

It is believed fundamental (and has been so held in the Sixth Circuit) that "* * * in the construction of a penal statute, all reasonable doubts concerning its meaning must operate in favor of the accused." *North American Van Lines v. United States*, 243 F. 2d 693, 696 (CA 6, 1957). Statutes may not be held to extend to cases not covered by the words used. *Farmer v. United States*, 128 F. 2d 970, 972 (CA 10, 1942), *Schooler v. United States*, 231 F. 2d 560, 564 (CA 8, 1956), *North American Van Lines v. United States*, 243 F. 2d 693, 696 (CA 6, 1957).

Counts II and IV of the indictment herein do not therefore state criminal offenses under the statute specified therein.

CONCLUSION.

Petitioner submits that the affirmance of his conviction represents such a flagrant departure from the accepted and usual course of judicial proceedings by both the District Court and the Court of Appeals for the Sixth Circuit that the invocation of this Court's power of supervision is essential in order that this Petitioner may be accorded the justice to which he is entitled under the laws and the Constitution of the United States.

WHEREFORE, Petitioner prays that a writ of certiorari issue from this Court to the United States Court of Appeals

for the Sixth Circuit, and that he be given leave to present these matters on their merits.

Respectfully submitted,

MORRIS R. BLANE,
Petitioner Pro Se.

JAMES J. CARROLL,
JOHN R. JEWITT,
Attorneys for Petitioner.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Appeal No. 16737—Caption Omitted.)

Decided April 8, 1967.

Before WEICK, Chief Judge, O'SULLIVAN, Circuit Judge, and TAYLOR, District Judge.

O'SULLIVAN, Circuit Judge. This is an appeal by Morris R. Blane from a judgment of the United States District Court for the Northern District of Ohio, entered upon a jury verdict finding him guilty of bankruptcy fraud as charged in four counts of a five count indictment. Blane is a Cleveland lawyer, specializing in bankruptcy practice. He acted as attorney for the Sterling Jewelry and Appliance Company, Inc., of Cleveland at the time of, and prior to, that company's filing of a petition on August 30, 1961, for an arrangement of debts under Chapter XI of the Bankruptcy Act, and its subsequent adjudication of bankruptcy on October 16, 1961.

Counts I and II charged generally that Blane, in contemplation of his client's bankruptcy, had obtained from Sterling described jewelry and other assets and transferred and concealed the same from the trustee in bankruptcy, in violation of 18 U. S. C. § 152. Blane was acquitted of Count III. Count IV charged Blane with conspiring (in violation of 18 U. S. C. § 371) with the president of the bankrupt, Harold I. Slote, to violate 18 U. S. C. § 152 by seeking out various suppliers for Sterling and ordering from them merchandise that would not be paid for, and that would be concealed during bankruptcy proceedings in recently acquired warehouses; it was further charged under this count that Blane would "retain and conceal unto himself assets and property purchased in pursuance of the conspiracy" with intent to defraud the creditors of

Sterling after the company went into bankruptcy. Count V charged Blane with conspiring with the said bankrupt's president Slote to use the United States mails to further their fraudulent scheme and purpose, in violation of Section 371 (conspiracy) and Section 1341 (mail fraud) of 18 U. S. C.[1]

Appellant does not question the sufficiency of the proofs introduced at the trial to allow the jury to find him guilty beyond a reasonable doubt. The evidence indicated the following: In January, 1961, Sterling Jewelry and Appliance Company of Cleveland was unable to pay its debts, which then totaled about $62,000. Appellant, a lawyer specializing in bankruptcy matters, was consulted. Under his advice and guidance, Slote, president of bankrupt, set about to buy large quantities of new merchandise, notwithstanding his company's perilous financial condition, with the result that between January 1961, when Blane was employed, and the time the bankruptcy proceedings were instituted in August and October of the same year, the Sterling Jewelry Company's accounts payable rose from $62,000 to approximately $175,000. At Blane's suggestion and with his cooperation this merchandise was not paid for and some of it was concealed from the bankruptcy court. There was evidence that Blane took and kept out of the bankrupt's stock a diamond engagement ring, two pearl chokers, a clasp and pin combination of diamonds and pearls, and a pair of binoculars and case; these items were not scheduled as part of the bankrupt's assets, as required by law.

We affirm the District Court judgment and will discuss appellant's citations of error as follows:

---

[1] Harold Slote pleaded guilty to charges which involved him in the same criminal enterprise as was the subject of the indictment of appellant Blane. He testified for the government at Blane's trial.

1) Cross-examination of character witnesses.

Two of defendant's character witnesses were asked upon cross-examination whether they had read any newspaper articles concerning appellant and whether such articles were considered by them in their evaluation of Mr. Blane's reputation. Parts of that cross-examination we set out in Appendix A. Defendant's attorneys objected to the line of questioning developed by the prosecution, and moved for a mistrial. In denying the motion, the District Judge said to counsel, in part:

> "I have suggested that I thought it would have been proper if a witness had disclosed there were rumors. I think it proper for the Government to ascertain of any character witness whether or not he has heard rumors. I believe that this properly embraces the reading of a newspaper.
>
> "But I have suggested I wouldn't allow that inquiry to go any further than to ask such a witness whether or not the rumors, or this article, became a part of the discussion between the witness on the stand and the people from whom he states he has obtained Mr. Blane's reputation."

He then spoke to the jury as follows:

> "The Court: At this time, ladies and gentlemen, I wish to comment upon and instruct you regarding the witnesses who have appeared to give testimony as to reputation of the defendant, Mr. Blane.
>
> "The Defendant has offered testimony of witnesses as to general reputation of the Defendant for truth and veracity or honesty and integrity.
>
> "Later in my general instructions I will instruct you further upon this subject, however, at this time I instruct you that since the Defendant has offered witnesses to prove his good name, it is permissible and proper for the prosecution to cross examine these witnesses to test the sufficiency of the witnesses'

knowledge to determine if they are qualified to give an opinion by inquiry into the extent of the acquaintance of the witnesses with the Defendant, the community in which he has lived, and the circles in which he has moved, so that the Court and jury can determine if the witnesses are qualified to speak with authority of the terms in which generally the Defendant is regarded.

"Although the prosecution has asked the witnesses certain questions, there is no proof in this case as to the content of any rumors concerning the reputation of Mr. Blane, nor of the contents of any newspaper articles concerning Mr. Blane.

"Therefore, you are not permitted to draw any inference or assumption as to contents of any rumors or newspaper articles from the questions asked by the prosecution of the character witnesses.

"The cross examination by the prosecution of the character witnesses is limited to testing the sufficiency of the opinions of the witnesses as to general reputation of the Defendant and can be considered by you only in determining what weight you shall give to the testimony of the character witnesses."

We are of the view that the accused rulings of the District Judge were, in their context, an exercise of discretion which was not abused. In affirming him there would be little profit in our attempting meticulous analysis or distinction of the recited cross-examination vis-a-vis cross-examinations in other cases which have been held to be impermissible. *Pittman v. United States*, 42 F. (2) 793, 795-8 (CA 8, 1930); *United States v. Phillips*, 217 F. (2) 435, 443, 444 (CA 7, 1954). This much should be said, however: the specific contents of any newspaper report were not disclosed and we discern no government effort to do so; and the jury was carefully warned that the prosecution's questions could only be used to test whether the wit-

nesses' avowed familiarity with the defendant's reputation was broad enough to include an awareness that reports of certain incidents, derogatory of that reputation, had been carried in the newspapers. Newspaper accounts may be as much a part of a community's thinking regarding the reputation of an individual as rumors and suspicions that circulate orally among his neighbors and associates. To the extent that *Sloan v. United States*, 31 F. (2) 902, 905, 906 (CA 8, 1929), appears to hold differently, we advise our disagreement with its conclusion. We consider that the legitimate scope of the cross-examinations here involved was a matter for the trial judge's discretion. See *Mannix v. United States*, 140 F. (2) 250, 251 (CA 4, 1944). It would be presumptuous for us to attempt improvement on the learned dissertation of the subject by Mr. Justice Jackson in the majority opinion in *Michelson v. United States*, 335 U. S. 469, 93 L. Ed. 168 (1948); he said, in part, therein:

> "Both propriety and abuse of hearsay reputation testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject." 335 U. S. at 480; 93 L. Ed. at 176.

Having in mind the content of the accused cross-examinations and the District Judge's careful admonition to the jury as to the limits to their consideration of them, we are satisfied that he acted discreetly.

2) Alleged error in denial of request for instruction.

In his request for instruction No. 3, which was denied by the District Court, appellant set out at length his theory of defense. Therein he recited, relevant to the charge of

his obtaining, transferring and concealing certain jewelry and other assets of the bankrupt, his claim that he had received these items as payments on account of attorney fees for the services he rendered or would render to his client, Sterling Jewelry and Appliance Company. The request would have told the jury that attorney fees could be paid in property as well as cash; that even though payment of attorney fees for services not germane to, or in anticipation of, bankruptcy within four months of bankruptcy might be a preference, it would not thereby be a criminal offense; that if attorney's fees were paid in property or money for services rendered, or to be rendered, in contemplation of bankruptcy, such payments were sanctioned by the Bankruptcy Act, subject to re-examination as to their reasonableness, and were not criminal offenses. Further expatiation of the circumstances under which Blane's acquisition of the bankrupt's property could be viewed as non-criminal was set out in varying repetitive styles. In our view part of the refused requests misstated the law, but for our holding we may assume that it did not do so.

In a criminal case, it is reversible error for a trial judge to refuse to present adequately a defendant's theory of defense, especially where a proper request therefor is proffered. *Bird v. United States*, 180 U. S. 356, 361, 45 L. Ed. 570, 573 (1901); *Hendrey v. United States*, 233 Fed. 5, 18 (CA 6, 1916); *Marson v. United States*, 203 F. (2) 904, 912 (CA 6, 1953); *Levine v. United States*, 261 F. (2) 747, 748, 749 (CA D. C. 1958). It is not required, however, that the exact language of a request be given, if the charge as a whole adequately covers the theory of the defense. *Sugarman v. United States*, 249 U. S. 182, 185 (1919); *Henderson v. United States*, 218 F. (2) 14, 18 (CA 6, 1955), *cert. den.* 349 U. S. 920, rehearing denied 349 U. S. 969; *Ridenour v. United States*, 14 F. (2) 888, 892 (CA 3, 1926).

Relevant to the subject matter of appellant's request No. 3, the District Judge did charge:

"Four essential elements are required to be proved in order for you to find the Defendant guilty as charged in count 1 of the indictment. If even one of these elements is not proved, then you must find the Defendant not guilty; First, you must find that there was an estate in bankruptcy as charged; second, you must find that one or more of the items of property described in the indictment properly belonged to the estate of the bankrupt as alleged; third, that the Defendant, individually or as an aider and abettor, concealed said property and assets from the Trustee in bankruptcy, as charged; and fourth, you must find that the Defendant did such act or acts knowingly and fraudulently.

* * * * *

"It is no defense that the concealment may have proved unavailing. Even though the entire amount of the property allegedly concealed may be recovered for the bankrupt estate, the Defendant may nonetheless be guilty. The offense alleged in count 1 of the indictment is complete if the Defendant knowingly and with fraudulent intent concealed any of the bankrupt's property of value from the Trustee in bankruptcy as charged.

"You will bear in mind that the accused is not here on trial because the bankrupt failed to pay his debts. The law does not impose upon any corporation a restraint upon its right to spend money or otherwise dispose of property in good faith while indebted to others. Thus, at any time prior to the filing of a petition in bankruptcy, a corporation may pay one creditor and not others, thus preferring one creditor over another, or may gamble, give away, or otherwise relinquish to others money or property in its possession or under its control; or may wisely or foolishly dissipate its money or property prior to bankruptcy, and

such acts do not constitute a crime against the Bankruptcy laws of the United States.

"An attorney at law, representing a corporation in financial difficulty, is entitled to contract for and receive fees in compensation for services rendered or to be rendered. It is not unlawful for a corporation, expecting to file a voluntary petition in bankruptcy, or expecting that creditors will petition against it, to retain an attorney for the purposes of such proceedings, and to pay the attorney in advance a reasonable fee for his services, or transfer property to him in compensation for such services or in compensation for the attorney's services in endeavoring to keep the corporation out of bankruptcy.

"If you find from the evidence that the receipt by the Defendant of any property of The Sterling Jewelry & Appliance Company was for services rendered and to be rendered in contemplation of an ensuing bankruptcy proceeding, then I charge you that the receipt by the Defendant of such merchandise or any other merchandise prior to the filing of the proceedings in the Bankruptcy Court was not an offense as charged in count 1 of the indictment. However, if the Government has proved beyond a reasonable doubt that the transfer of the property described in the indictment was knowingly and fraudulently done to conceal said property from the Trustee in bankruptcy, then such act of transfer and concealment is a criminal offense as charged in the first count in the indictment.

"So under the charge in count 1 of the indictment, notwithstanding the bankrupt's indebtedness, the Defendant had the right to receive the bankrupt's property or aid the bankrupt in selling, transferring or otherwise disposing of the property to the Defendant or to others at all times prior to the filing of the petition in bankruptcy on August 30, 1961, and even prior to the adjudication of the bankruptcy on October 16, 1961. But the Defendant, individually or as an aider and abettor, could do this only so long as he did not

do so knowingly and fraudulently; that is to say, so long as he did not cause at least one of the items of property alleged to be part of the bankrupt estate to be transferred for the purpose and with the intent to conceal such property or the proceeds thereof from the Trustee in bankruptcy and thereby defraud the creditors of The Sterling Jewelry & Appliance Company."

Without further quotations therefrom, we are satisfied that the District Judge's total charge covered the legitimate content of appellant's Request No. 3.

3) Alleged prejudicial admonition to jury.

At the week end adjournment following the closing of the proofs, the District Judge spoke to the jury as follows:

"The Court: Now, ladies and gentlemen, we have reached that point in this case where, from your own experiences, or observations, you may well have concluded that you have heard this case. I wish to emphasize at this time that this case is not concluded. The attorneys in this case are going to be permitted to summarize and give you their interpretations of the evidence. They are going to be permitted to argue the case to you, and one of the critical parts of every trial is at this time, as best I can judge it, not going to be given to you until some time Monday, and what I am referring to is the instructions as to the law of this case.

"The instructions which the Court will give as to the law will follow the arguments of counsel. It is not until you know the law of the case that you can arrive at a just verdict.

"Now, I have admonished you at different occasions by calling your attention to the fact that you are not to discuss this case among yourselves until it is finally submitted, and it is not yet finally submitted.

I have admonished you that you should not form or express any opinion as to the guilt or innocence of the accused until the case is finally submitted and it has not been finally submitted.

"I have put double emphasis on the fact that you should not permit anyone to speak to you on the subject of this case. Now, you will recall the great care and the extent of inquiry that was made during the voir dire to determine your qualifications as jurors, to determine whether you were persons who had an open mind on the subject of this case, and that you would impartially consider this case and not be influenced by anything except what you heard from the witness stand by way of testimony, and the exhibits and other evidence which the Court has admitted.

"Now, if you should permit anyone to speak to you on the subject of the case, no matter how slight, it is impossible for you to divorce this from your mind. So avoid it. If someone speaks to you and they attempt to speak to you on a subject of this case, you tell them you are on this jury, and when I told you that if anyone persisted in talking to you you should communicate to me, this was no idle suggestion.

"Now, I realize that each of you have husbands and wives and members of your family, and when you go home your wife or husband, as the case may be, is going to say 'How did the case go?' I am not talking about that. Your children may ask you some idle thing about it and you may answer them, but what I am concerned with is that someone who has a deliberate purpose of influencing your mind will do or say something which would so contaminate your mind that you could not follow your oath, and you could not perform the duties you have sworn to perform, and this, of course, is what I am striving with every possible means at my disposal to prevent.

"Now, if any of you have had an experience, an occasion where somebody has sought to talk to you about this case or communicate with you, I don't care

what manner, telephone, written, or otherwise, I want you to let this Court know. There may be an occasional reluctance on your part to take part in any inquiry that may follow, but the right, the privilege, of sitting on a jury in this great country is one of the highest privileges which an American citizen has to serve his country and community, and I want you to keep these instructions in mind and come back here Monday morning at 10:00 o'clock in such a state of mind without any contamination as you were in when you began the trial of this case."

Relevant to the foregoing, the appellant's brief states:

"In the late afternoon of Friday, January 29, 1965, the Government concluded its rebuttal evidence. By reason of the late hour of the day, adjournment was in order. Prior to adjournment, however, the United States Attorney requested a conference at the bench with the court and counsel for the defendant and stated thereupon that the Government had learned that some member or members of the jury had been contacted and offered a sum of money. The United States Attorney thereupon asked that the jury be instructed to advise the court if any member or members had been or should be contacted. Defense counsel represented to the court that neither they nor any person known to them had ever contacted or attempted to contact or influence any juror and that any admonition beyond the scope of the court's usual pre-adjournment admonition would be understood and accepted by the jury as an accusation of corruption and corrupt activities on the part of the defense and/or defendant. The court made no response to the remarks of counsel for either party.

"Believing that the court would desist from any admonitory language beyond the tenor of the usual pre-adjournment admonition, defense counsel upon resuming their seats, were appalled to hear the following."

The brief then goes on to quote the admonition above set out *leaving off, however, the first two paragraphs.* While the government's brief disputes the accuracy of appellant's recital of the events that preceded the giving of the above quoted admonition (there is no transcript of the bench conference), we will assume that appellant's counsel has accurately set out his recollection of the facts. His brief's inadvertent failure, however, to include the two paragraphs which prefaced the accused admonition gives a wrong impression of its total context. Rather than a mysterious bench conference immediately followed by the judge's warning to the jury not to speak with anyone concerning the case and to report promptly to him any improper approaches, the judge first commented that the most crucial part of the trial was yet to come, the summation and the instructions—then matter-of-factly followed the pre-adjournment admonition. We find unjustified appellant's following characterization of the District Judge's conduct:

> "The words, the tone, the atmosphere, the setting and the prestige of the United States as a party combined to form, in aggregate, an almost explicit accusation against the defense and the defendant of jury tampering, guile, dishonesty and corruption."

The remarks made by the District Judge were within his discretion, and even though reflection might suggest some different and better way of handling the matter, we are persuaded that the circumstances did not "affect substantial rights" of appellant. Rule 52(a) F. R. Crim. P.

4) Alleged impropriety in allowing the jury to have the written instructions.

A written copy of the District Judge's entire charge was given to the jury. The circuits which have considered

such action have held that it is within the judge's discretion. See *Oertle v. United States,* 370 F(2) 719, 729 (CA 10, 1966) and cases cited therein at note 16; *United States v. Standard Oil Co.,* 316 F(2) 884, 896 (CA 7, 1963); *McDaniel v. United States,* 343 F(2) 785, 789 (CA 5, 1965), *cert. den.* 382 U. S. 826; *Garst v. United States,* 180 F. 339, 345 (CA 4, 1910). In view of the length of the trial and the extensive matters covered by the judge's instructions, we find no fault with the District Judge's handling of the matter.

The appellant's claim that Count II of the indictment did not state a criminal offense is, in our view, patently without merit, and we need not discuss it.

Judgment affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Entered April 8, 1967.)

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No Costs Awarded. Rule 23(4).

Entered by Order of the Court.

CARL W. REUSS,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1365

MORRIS R. BLANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 32–44) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1967. The petition for a writ of certiorari was filed on May 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to permit government counsel, in cross-examining character witnesses for petitioner at trial, to inquire whether the witnesses were

264-831—67

familiar with derogatory newspaper articles concerning petitioner.

2. Whether the trial judge's remarks to the jury prior to a weekend adjournment constituted prejudicial error.

3. Whether the trial judge's instructions adequately charged petitioner's theory of defense.

4. Whether 18 U.S.C. 152 covers concealment of assets of a corporation by an agent thereof in contemplation of the bankruptcy of that corporation.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on four counts of an indictment charging him with transferring and concealing the property of a bankrupt with intent to defeat the bankruptcy laws, conspiring to do so, and conspiring to commit mail fraud (in violation of 18 U.S.C. 152, 371, 1341).[1] On April 30, 1965, he was sentenced to concurrent terms of forty months' imprisonment on Counts 1 and 2, and to additional forty-month terms on Counts 4 and 5 (these sentences to be concurrent with each other); he was also fined a total of $10,000 ($5,000 on Count 1 and $5,000 on Count 4). The court of appeals affirmed.

The evidence, the sufficiency of which is not in issue, showed that in January or February 1961 one Slote, president of the Sterling Jewelry & Appliance Company (hereinafter "Sterling"), retained petitioner, an attorney specializing in bankruptcy matters, with

[1] Petitioner was acquitted on a fifth count (Count 3).

regard to the company's financial difficulties. At the time, Sterling had debts of $62,000 (App. 61a–63a, 65a, 125a, 151a).[2] Petitioner advised Slote to build up Sterling's inventory so as to increase its debts (App. 66a–67a, 77a, 81a, 199a–200a, 213a). Slote thereafter ordered large quantities of furniture and appliances (App. 73a–74a, 79a). Pursuant to additional instructions from petitioner, he stored most of the goods in a rented warehouse (App. 73a–76a, 79a). When, in August 1961, petitioner filed for a Chapter XI arrangement of Sterling's debts, the merchandise kept in the warehouse was not disclosed to the bankruptcy court. At that time, claims of creditors against Sterling totaled $175,000 (App. 19a, 83a). The government's evidence also disclosed that in the period February–August 1961, petitioner received various items of jewelry from Slote, which items had not been paid for and were not included in the schedule of the bankrupt's assets (App. 85a, 91a, 93a, 97a–98a, 127a; see App. 95a).

Petitioner testified that he had received the jewelry as payment for legal services. He denied concealing Sterling's assets from the bankruptcy court (App. 324a–326a, 331a, 334a, 345a, 352a–354a, 364a).

ARGUMENT

Petitioner presents no question warranting further review. No conflict with decisions of this Court or among circuits in fact exists; nor is there any occasion for the exercise of this Court's supervisory power.

[2] "App." refers to the appendix to petitioner's brief in the court of appeals, containing excerpts from the transcript of proceedings at trial.

1. Six character witnesses testified for petitioner. Petitioner contends (Pet. 11–18) that the trial judge erred in permitting government counsel to cross-examine two of these witnesses concerning their awareness of newspaper articles reflecting adversely on petitioner's reputation. The contention is, however, relevant only as to one of the witnesses (Preisler), since the record reveals that the trial judge instructed the jury to disregard the testimony of the other witness (App. 415a–416a). With regard to Preisler, the following interchange occurred (App. 407a–408a):

> Q. Did you come about your opinion from what newspapers had said about him or not?
>
> A. No.
>
> Q. Have you read any newspaper accounts about him?
>
> Mr. CARROLL [petitioner's lawyer]. Objection, your Honor.
>
> The COURT. Overruled.
>
> A. Yes.
>
> * * * * *
>
> Q. Did you take into account, or did you not, what you had read about him in the newspapers?
>
> A. I didn't believe them.
>
> Q. What didn't you believe?
>
> A. I didn't believe the articles in the newspapers about him.
>
> Q. What articles?
>
> A. Saying that he had done something dishonest.
>
> Q. What did the newspapers say that he had done dishonest?
>
> A. I don't recall.

Mr. CARROLL. I move the answer be stricken * * *.

The COURT. The objection is sustained. The jury is to disregard the question and the answer.

* * * * *

Q. When you read an account in the newspaper saying that he did something dishonest——

Mr. CARROLL. I object and ask that Mr. McCurdy specify the newspaper of which he is speaking.

Mr. MCCURDY. I will be very glad to do that.

Mr. CARROLL. May we approach the bench on this matter?

The COURT. Yes.

At this point a preliminary examination was held outside the presence of the jury (App. 408a). The full transcript shows that, as brought out at this hearing, government counsel was referring to an article about an incident unrelated to the present charges, which the witness denied having seen. At the conclusion of the hearing, the court ruled that government counsel could not refer to that article, but could ask the witness on what basis he disbelieved the article which he had already testified, he had seen and not credited (Tr. 971–975). There then occurred the cross-examination set forth at pages 13–14 of the petition. On redirect examination, the witness testified that he did not believe that the article pertained to this case (Tr. 978). At the conclusion of the character witness testimony, the court instructed the jury that the cross-examination regarding the derogatory newspaper arti-

cles could be considered only for the purpose of testing the witnesses' familiarity with petitioner's reputation (see Pet. App. 34-36).

In these circumstances, the court of appeals properly held that, considering the limiting instructions, it was not error to permit the cross-examination. In *Michelson* v. *United States*, 335 U.S. 469, this Court stated (*id.* at 479):

> Another hazard [of putting on a character witness] is that * * * [the] witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. * * *

This language, we submit, fully supports cross-examination of character witnesses as to newspaper articles bearing on a defendant's reputation. There is no basis for a distinction between such articles and other types of rumors or reports. See *United States* v. *Giddins*, 273 F. 2d 843, 845 (C.A. 2), certiorari denied, 362 U.S. 971. Indeed, since the existence of a newspaper article may be more readily verified (as was done here) than the existence of a rumor which is merely "afloat" in the community, examination as to familiarity with such an article seems less likely to prejudice a defendant. *Sloan* v. *United States*, 31 F. 2d 902, 905-906 (C.A. 8), is not, in our view, to the contrary. There the court disallowed cross-examination of a character witness based upon a newspaper

article, finding that the "patent purpose of counsel was not impeachment, but to get before the jury the incident [which was the subject of the article]" (*id.* at 906). The record here reveals no such design.[*]

Moreover, Preisler was but one of five character witnesses whose testimony was permitted to be considered by the jury, including two State Common Pleas Court judges and a Congressman, all of whom testified that petitioner's general reputation for truthfulness was good. The evidence of petitioner's guilt was overwhelming. Hence, even if there were error in permitting the cross-examination, it could not have been prejudicial.

2. At the close of the evidence, just prior to adjournment for the weekend, the trial judge instructed the jury not to permit anyone to speak to them about the case and to let the court know if anyone attempted to communicate with them about the case (Pet. App. 40–42). The court of appeals, assuming *arguendo* that the remarks were occasioned by the fact that government counsel advised the judge at a bench conference of learning that some members of the jury had been contacted and offered money, found the judge's admonition to be within the range of his discretion (Pet. App. 43). This holding was fully justified. The portion of the charge which petitioner has italicized (Pet. 24–25) cannot be divorced from the whole charge. Read in context, the remarks of the judge were not improper.

[*] In addition, *Sloan* was cited in the *Michelson* opinion (335 U.S. at 480–481, n. 17) only for the proposition that "[i]t has been held error to use the question to get before the jury a *particular derogatory newspaper article*" (emphasis added).

3. Petitioner contends (Pet. 22) that the trial judge's instructions (Pet. App. 38–40) regarding his theory of defense were inadequate because they did not allude to his contention that he had received the items of jewelry prior to Sterling's contemplation of bankruptcy. The court instructed the jury that, if the jewelry was received by petitioner in compensation for his legal services to the company, then such receipt would not be an offense as charged in Count 1 of the indictment (Pet. App. 39). This hypothesis put the crux of petitioner's defense as to the items of jewelry before the jury. Whether the items were received when the company was in contemplation of bankruptcy was irrelevant to the defense claim.

4. Petitioner contends (Pet. 27–30) that Counts 2 and 4 of the indictment do not charge offenses under 18 U.S.C. 152, which provides in part:

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation * * * knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation [is guilty of a crime].

Petitioner argues that the word "other", which twice appears before the term "person", modifies not only that term but also the term "corporation", which follows it. Such a construction would except from the law agents of a corporation who conceal or transfer its assets rather than the assets of another corporation. Neither the language of the statute nor its legislative history (see U.S. Code Cong. & Adm. News,

86th Cong., 2d Sess., pp. 3307–3310) supports any such interpretation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1967.

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SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 138.

MORRIS R. BLANE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR RE-HEARING.
(On Order Denying Certiorari.)

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 138.

MORRIS R. BLANE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR RE-HEARING.
(On Order Denying Certiorari.)

This petition for re-hearing on the order of the Supreme Court entered October 9, 1967, denying certiorari to the United States Court of Appeals for the Sixth Circuit is filed herein pursuant to Rule 58 (2) of the Rules of the Supreme Court under that portion of the Rule entitling a petitioner to petition for re-hearing on "* * * other substantial grounds available to petitioner although not previously presented."

The grounds for this petition rest upon the premise that petitioner was convicted and sentenced upon four (4) counts of a five (5) count indictment charging unlawful bankruptcy practices solely upon the testimony of a former client, who prior to and at the time of trial of the case was a psychopathic personality residing in a mental hospital under a varying diagnosis of "schizophrenic reaction, chronic, undifferentiated type," and "schizophrenic reaction, chronic, schizo-affective type."

Reference is made to a portion of the testimony of a psychiatrist on voir dire concerning the mental aber-

rations of the Government's chief witness, Harold I. Slote, reproduced in the Petition for Certiorari at page 6. The question now presented, however, was not developed or argued in the Petition for the Writ although the mental disability of the proffered witness was strenuously argued by counsel for the petitioner in the District Court.

By way of preamble as to the importance of the problem, it is suggested in the first instance that petitioner is an attorney who has practiced continuously in Cleveland, Ohio, for some thirty-three (33) years without any blemish on his record. A sampling of the clientele of any attorney practicing in a large metropolis will reveal, in addition to the ordinary level-headed client, the ever-present neurotic and even psychotic individual together with the out-and-out criminal. One counsels and litigates cases for the injured client, recognizing ofttimes the overtones of anxiety neurosis; one defends the criminal case and can hardly practice in this field without recognizing the sociopathic and psychopathic traits of the criminal mind. Further, one spends a considerable amount of time counselling and more often wet-nursing and humoring the neurotic who has only an imaginary legal problem. This is the very nature and also the sometimes fascinating reward of the profession. These experiences add considerable levity to luncheon discussions with other attorneys and there is hardly an attorney worth his salt who does not have a handful of so-called "crackpots" as clients. Mindful of the hazards of such a varied practice, the cautious attorney purchases liability insurance to insulate himself as best he can. In the limbo of his imagination, however, there is always the realization that a dissident and ofttimes neurotic client will go to the Bar Association or even file a malpractice suit.

Notwithstanding the above, it is virtually incomprehensible to any attorney that he will be indicted, convicted and sentenced to eighty (80) months upon the testimony of a former client who is not merely neurotic but a conceded psychopathic personality. Perhaps the average attorney takes refuge and consolation in the fact that there appear to be no reported cases where such a catastrophe has occurred.

However, now that it has all become a reality to petitioner, this Court should exercise its supervisory power and determine in the light of psychiatric advancement the real extent to which a voir dire ought to be conducted in a case where the trial judge, the District Attorney and defense counsel have the unequivocal knowledge prior to trial that the Government's chief witness, without whom a conviction could not be supported, is shown to have a long-standing history (since 1944 in the case at hand) of a mental disease ranging from an initial diagnosis of anxiety neurosis to chronic schizophrenic reaction.

Petitioner would undoubtedly be less vehement in this contention if the character of the mental affliction bore no reasonable or rational relationship to the type of testimony he was called upon to give. However, in the instant case, the very nature of the affliction, viz. chronic schizophrenic reaction, suggests that the witness was suffering from a mental disease, the manifestations of which to quote a portion of the testimony of the psychiatrist who testified:

> "* * * Despite seeking advice from many sources, he attempts to give the impression of great independence and self-sufficiency. In order to do this, he frequently distorts the facts and attempts to cover up his feelings of doubt, weakness and inadequacies."

It is significant to note that the following appears on page 129 of *Steckers Fundamentals of Psychiatry*, 6th Edition, J. B. Lippincott Company, concerning schizophrenia:

> *"Since the ego must be absolved the blame for failure is projected outside the individual onto others or the condition of things."* (Emphasis added.)

The testimony ultimately received from this witness sought to transfer to petitioner, former attorney of the witness, all of the responsibility of the misfeasance of the witness in secreting assets that should have been disclosed to the trustee in bankruptcy. The insinuation was made that the concealment of such assets was part of an overall scheme which was solely the handiwork of the witness's attorney.

This is exactly the type of testimony which can be counted upon from a schizophrenic personality: the transference of blame for one's own failures and errors to another in order to cover his own feelings of doubt, weakness and inadequacy!

The trial judge should have addressed himself to the proposition as to the type of testimony which the Government intended to elicit from the witness. If that testimony tended to exculpate the witness and implicate petitioner, then the trial court should have conducted searching inquiry as to whether or not such exculpatory testimony would be a natural consequence consistent with a person suffering from a schizophrenic reaction. If psychiatric testimony answered this question in the affirmative, which it most certainly did in this case, the trial judge should not have been content with the fact that the witness "appeared to be well oriented" and "had good contact with reality" as a basis for finding the witness to be competent. As an example, a psychopathic liar may be thoroughly oriented and have good contact with reality but he is nonetheless

somewhat anti-factual. It is urged that the trial court completely abused its discretion in finding this witness to be competent with the result that the petitioner was most assuredly deprived of due process of law.

If the psychopathic criminal is to be sheltered under one protective wing of Due Process, the other wing must afford the same protection to a mentally competent individual who is preyed upon by the psychopath. If this protection does not have reciprocal effect, it is meaningless!

Does the acceptance and application of the testimony of a mentally afflicted and institutionalized Government witness comport with the requirements of due process and with the protective concept thereof?

Although "due process" is a somewhat ephemeral concept welded to legal reality by the holdings of this Court and others, as defined in the excerpts hereinbelow quoted, it would appear evident that a conviction predicated primarily upon the psychotically-motivated testimony of a Government witness suffering from a mental disease, viz. chronic schizophrenic reaction, cannot be justified if "due process" is to have any significance in controlling the prosecution efforts of the sovereignty and in protecting the individual from that which is arbitrary, unfair or constitutionally tainted.

This Court has stated in *Rochin vs. California*, 342 U. S. 165, 169, 173, 96 L. ed. 183, 72 S. Ct. 205, 25 A. L. R. (2d) 1396 (1951):

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) *in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of Eng-*

lish-speaking peoples even toward those charged with the most heinous offenses.' * * * These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are *'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' * * * or are 'implicit in the concept of ordered liberty.'"* (Emphasis supplied.)

"Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that *convictions cannot be brought about by methods that offend 'a sense of justice.'"* (Emphasis supplied.)

In *Wolf vs. People of Colorado*, 338 U. S. 25, 27, 93 L. ed. 1782, 69 S. Ct. 1359 (1949), this Court, speaking of the continuing viability of "due process of law," pronounced:

"Due process of law thus conveys neither formal nor fixed nor narrow requirements. *It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society.* But basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." (Emphasis supplied.)

It is submitted that a conviction had upon the testimony of an institutionalized schizophrenic, and the admission into evidence of such testimony is offensive to a "sense of justice"; is inconsistent with "those canons of

decency and fairness which express the notions of justice of English-speaking peoples * * *"; is the antithesis "of those personal immunities which are rooted in the traditions and consciences of our people"; is not within the "concept of ordered liberty"; and is destructive of those considerations which are "basic to our free society."

It is submitted that the sixth amendment right to confront—to cross-examine—one's accuser is meaningless if the accusatory testimony is that of a mentally diseased witness. There can be no effective cross-examination of a schizophrenic personality.

In *Estes vs. Texas*, 381 U. S. 532 (1965), this Court very recently set aside a conviction despite the absence of any showing of prejudice. The Court stated at 542-543:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

The Court further cited with approval the language of Mr. Justice Black for the court *In re Murchison*, 349 U. S. 133, 136 (1955), that "our system of law has always endeavored to prevent even the probability of unfairness."

If identifiable prejudice within the concept of "due process" be required to grant this petition, notwithstanding the language of *Estes* (*supra*), it is clearly demonstrated in this case.

The trial court found this witness to be competent to testify when in fact he had been residing in a mental hospital for five (5) continuous months prior to trial and was in such a condition that he was personally conveyed from the hospital and back each day throughout his testimony by the Justice Department; that the witness at the time of

the trial and for some months prior thereto was receiving a one hundred (100) percent mental disability pension from the Veteran's Administration; that the witness was "staffed" (meaning his case was reviewed) at the instance of the Government on January 6, 1965, some twelve (12) days before his testimony at trial, whereupon the diagnosis of his mental condition was revised from "schizophrenic reaction, chronic, undifferentiated type," to "schizophrenic reaction, chronic, schizo-affective type," in an obvious effort to place him in a less severe category of mental diseases as classified by the American Psychiatric Institute. See text: *Psychology, Psychiatry and Law* by Katz, Goldstein and Dershowitz © 1967 at page 506. The fact of the matter is that there is no slight legerdemain or manipulation which could possibly remove the basic diagnosis of schizophrenic personality of a serious degree.

CONCLUSION.

The petitioner's rights to due process of law and to an effective confrontation of witnesses under the provisions of Amendments V and VI to the Constitution of the United States have been abridged in this matter.

It is submitted that a conviction, based primarily upon the testimony of an institutionalized schizophrenic necessarily violates all considerations of due process of law—"those canons of decency and fairness which express the notions of justice of English-speaking peoples"—those personal immunities which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental * * * or are implicit in the concept of ordered liberty."

It is submitted that the privilege of confronting—of cross-examining—an institutionalized schizophrenic falls far short of the effective cross examination which is contemplated and guaranteed under Amendment VI to the

Constitution of the United States, and that such testimony should not have been allowed by the trial court.

WHEREFORE, petitioner prays that this petition be granted and that a writ of certiorari issue from this Court to the United States Court of Appeals for the Sixth Circuit, and that he be given leave to present these matters on their merits.

Respectfully submitted,

MORRIS R. BLANE,
Petitioner Pro Se.

JAMES J. CARROLL,
JOHN R. JEWITT, JR.,
Attorneys for Petitioner.

CERTIFICATE OF PETITIONER AND COUNSEL.

Pursuant to Rule 58 of the Supreme Court of the United States, we hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not for the purpose of delay and is restricted to the grounds specified in paragraph 2 of Rule 58.

MORRIS R. BLANE,
Petitioner Pro Se.

JAMES J. CARROLL,
Attorney for Petitioner.